IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Radhey Shyam Vs. Vinod Kumar & anr.

S.B.CIVIL FIRST APPEAL NO.18/1997 AGAINST THE JUDGMENT AND DECREE DATED 30.9.1996 PASSED BY LEARNED ADDL. DISTT. JUDGE NO.4, JAIPUR CITY, JAIPUR IN CIVIL SUIT NO. 192/95 (233/82).

Date of Order ** Friday,February 23, 2007.

REPORTABLE

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr.A.K.Bhandari, Sr.Adv. with Mr.M.M.Ranjan for the appellant.
Mr.N.K.Maloo & Mr.Vinod Kumar Tamoliya, for the respondents.

BY THE COURT:

1. This appeal is directed against the judgment dated 30.9.1996 of learned Addl. District Judge No.4, Jaipur City, Jaipur rejecting the civil suit no. 192/1995 (233/82) filed by the plaintiff Radhey Shyam against the defendants Vinod Kumar and Amal Kumar Choudhary claiming the right of pre-emption in respect of a portion of residential house situated at Chokdi Topkhana, Rasta Sahveeldaran Bhura Tiba, Jaipur.

2. According to the plaintiff, the said residential

house was owned by two persons jointly i.e. Smt.Sushila Devi and defendant no.2 Amal Kumar Choudhary who are related, Sushila Devi being the sister-in-law (Bhabhi of Amal Kumar Choudhary). According to the plaintiff Radhey Shyam, Smt.Sushila Devi agreed to sell her southern part of the said residential house to the plaintiff vide agreement dated 15.6.78 and under the said agreement, possession of the said portion of house was given to the plaintiff-appellant. On 15.5.1981 the registered sale-deed was also executed in his favour and thus he became co-sharer of the said property along with the defendant no.2 Amal Kumar Choudhary. Further according to the plaintiff, on 21.5.1981, defendant no.2 Amal Kumar Choudhary sold his share i.e. Northern part of the residential house to the defendant no.1 Vinod Kumar S/o Prem Shankar Tikiwal without any notice to the plaintiff though the plaintiff had a right of pre-emption being co-sharer of the property and thus his pre-emption rights namely right to be substituted in place of defendant no.1 at the same consideration for sale of property at which it was sold to defendant no.1 and, therefore, cause of action to file the suit arose to the plaintiff and, accordingly suit was filed claiming the aforesaid right of pre-emption.

3. The suit was contested by the defendants saying that the defendant no.2 had made an agreement to sell the

aforesaid Northern part of the house to the defendant no.1 Vinod Kumar on 22.4.1979 and the defendant no.1 was also put in possession of the said portion and a registered sale-deed in his favour was executed on 20.5.1981 just after five days of the registered sale-deed executed in favour of the plaintiff by Sushila Devi and according to the defendants, plaintiff had full knowledge of the said transaction between the defendant no.2 Amal Kumar Choudhary and defendant no.1 Vinod Kumar and, therefore, he should be deemed to have given up his claim of pre-emption as he never expressed his wilingness to purchase such portion of the property at the same consideration. Further according to the defendants, the said portion of property was offered to the plaintiff but he refused to purchase the same and, therefore, the sale in favour of defendant no.1 Vinod Kumar could not be assailed claiming the alleged right of pre-emption.

4. On the basis of the pleadings of the parties, the learned trial court framed the following issues:

(i)Whether the plaintiff had a right of pre-emption to purchase the disputed property?

(ii)Whether on the basis of written statement of defendants partially in para nos.5 to 8, suit deserves to be dismissed?

(iii)Whether the defendants are

entitled to special damages and if so to what extent?

(iv)Relief?

5. In support of the plaint, Radhey Shyam, plaintiff himself appeared in the witness box; whereas on behalf of defendant no.1, his power of attorney holder Pre Shankar, father of Vinod Kumar appeared as DW-1, Satish Kumar as DW-2, Chandra Bhan Giri as DW-3 and Vimal Kumar Choudhary as DW-4. Defendant no.2 Amal Kumar Choudhary appeared in the witness box as DW-2.

6. After considering the evidence on record, learned trial court decided issue no.1 holding that the plaintiff had a right of pre-emption over the disputed property in favour of the plaintiff and thus there is no contest on this issue nor any cross appeal was filed by any defendants on this issue.

7. However since the issue no.2 has been decided against the plaintiff by the learned trial court holding that the plaintiff had waived his right and had acquiesced in the matter, therefore, on the principles of estopple he has no right to be substituted in the conveyance deed in favour of the defendant no.1. Thus the issue no.2 was decided against the plaintiff and the appeal is directed on this issue only.

8. Issue no.3 only regarding special damages to the defendants was decided against the defendants. However, there is no appeal of the defendants on that issue.

9. I have heard the learned counsel at length and perused the evidence on record.

10. The Rajasthan Pre-emption Act, 1966 was enacted with a view to consolidate the laws in this regard which have their genesis in the Mohammedan Law in different parts of the country based on customs and it provided that right of pre-emption will accrue to specified persons in the specified order upon completion of a sale or upon passing of final decree for fore-closure, subject to the specified exemption. Section 6 enumerates the persons to whom right of pre-emption accrues and it mainly depends upon some part of immovable property like common stair-case, common entrance or other right or amenity and it accrues to the owners of property servient or dominant to the property transferred. Section 5 enumerates the case in which right of pre-emption does not accrue like transfer of a shop, katra, sarai, musafirkhana, dharamshala, temple, mosque or other similar buildings or upon a sale by or to the Central or State Government, or to any local authority, or transfer of property for manufacturing Industry etc. Section 8 envisages a notice

to pre-emptors and it lays down that when any person proposes to sell, or to foreclose the right to redeem, any immovable property, in respect of which any persons have a right of pre-emption, he shall give notice to all such persons as to the price at which he is proposing so to sell or as to the amount due in respect of the mortgage proposed to be foreclosed, as the case may be. Sub-section (2) of Sec.8 lays down that such notice shall be given through the civil court, within the local limits of whose jurisdiction the property concerned is situated, shall clearly describe such property, shall state the name and other particulars of the purchaser or the mortgagee and shall be served in the manner prescribed for service of summons in civil suits. Section 9 of the Act lays down that any person having a right of pre-emption in respect of any immovable property proposed to be sold shall lose such right unless within two months from the date of the service of such notice, he or his agent pays or tenders the price specified in the notice given under Sec.8 to the person so proposing to sell.

11. Hon'ble Supreme Court in ***Indira Bai Vs. Nand Kishore*** (AIR 1991 SC 1055), a case arising under the Rajasthan Pre-emption Act, held that the right of pre-emption is a weak and inequitable right and can be defeated by estoppel. The Hon'ble Supreme Court held as under:

"The provision in the Act requiring a vendor to serve the notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it. **Failure to serve notice as required under the Act does not render the sale made by vendor in favour of vendee ultra vires.** The test to determine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence, but if it is right of party alone then **it is capable of being abnegated either in writing or by conduct.** The Act does not provide that in case no notice is given the transaction shall be void. **The objective is to intimate the pre-emptor who may be interested in getting himself substituted.** The Act does not debar the pre-emptor from giving up this right. Rather in case of its non-exercise within two months, may be for the financial reasons, the right stands extinguished. It does not pass on to anyone. No social disturbance is caused. It settles in purchaser. Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare

> so as to be in mischief of public policy.
>
> Even otherwise on facts found that the **pre-emptor respondent knew of the sale deed, assisted the appellant vendee in raising the construction** and after the construction was completed he gave notice for exercise of the right and thereafter filed the suit would itself demonstrate that the conduct of the respondent was inequitable and the Courts in this country which are primarily the Courts of equity, justice and good conscience cannot permit the respondent to defeat the right of appellant and invoke a right which is a weak and inequitable right."

12. In ***Roopi Bai Vs. Mahaveer and ors.*** reported in AIR 1994 Rajasthan 133, learned Single Judge of this court held in para no.43 relying on the aforesaid judgment of Supreme Court that the right of pre-emption can be lost by estoppel and acquiescence where the property is alleged to have been offered to sale to plaintiff by vendor before it was sold to defendant/purchaser and the presence of plaintiff at the time of registration of sale deed and this probability that plaintiff was actively associated with execution of sale deed, could not be ruled out, therefore, looking to the conduct of the plaintiff, it was sufficient to estop him from claiming

right of pre-emption.

13. In **Bishan Singh and ors. Vs. Khazan Singh and anr.** Reported in AIR 1958 SC 838, while dealing with the case arising under Punjab Pre-emption Act, the Hon'ble Supreme Court has laid down in para no.11 that the right being a very weak right, it can be defeated by all legitimate methods such as a vendee allowing the claimant of a superior or equal right being substituted in his place.

14. One need not multiply the authorities on this point and aforesaid position of law seems to be fairly settled. In the light of aforesaid legal position, now it has to be seen whether the plaintiff in the present case can be said to have lost his right of pre-emption or not for that evidence which came before the trial court may be discussed here.

15. The dates of agreement of sale in favour of two respective parties namely plaintiff and defendant no.1 virtually coincide so also date of registered sale-deed. According to the pleadings of the parties, the date of agreement in favour of the plaintiff is 15.6.78 while the date of agreement in favour of defendant no.1 is 22.4.79 and the date of registered sale-deed in favour of plaintiff is given as 15.5.81; whereas the registered sale-deed in favour of defendant no.1 Vinod Kumar is said

to be 21.5.81. Both the parties claimed that they were respectively put in possession by vendors of the respective portions of the said property on the date when the Agreement to sell for the respective portions took place.

16. PW-1 plaintiff Radhey Shyam has denied that the defendant no.1 or defendant no.2 ever met him and offered to sell the Southern portion of the property to him. He admits that Suraj Narayan was his neighbour. He also denied that defendant no.1 Vinod Kumar carried out any repairs in the Southern portion of the property in the year 1979 though he admitted that some flooring work was done in the said portion. He denied that defendant no.1 Vinod Kumar started to live in the said Southern portion since July 1979. However in the cross-examination, he said that approximately one and half years prior to the Registry he had started living there but the exact date was not known to him. According to the plaintiff, in his statement recorded on 18.10.1994, he has stated that the knowledge of sale to Vinod Kumar came to him on 30.7.81 through Vinod Kumar himself.

17. As against this, DW-1 Prem Shanker, father of defendant no.1 Vinod Kumar and also his power of attorney holder has clearly stated that they came to know of the said portion of property being available for sale through

Suraj Narayan and in October 1978, he and Suraj Narayan had met with plaintiff offering him to purchase the said Southern portion of the property also and if he had no objection, then they could buy the same. In October 1978 only, both of them went to meet Amal Kumar Choudhary, defendant no.2, owner of the said portion of the property at Fagi. Thus after refusal by the plaintiff in April 1979, defendant no.1 entered into an agreement with defendant no.2 to purchase the said portion for a sum of RS.45,000/- and on 5.7.79, under the said agreement, sum of Rs.5,000/- was paid as an advance to Amal Kumar Choudhary whose receipt was also drafted by plaintiff himself which is Ex.A-1. The possession of the said property was also given to the plaintiff at that time in his presence. Since the said defendant no.1 further stated that one room of the said portion was given on rent to one Rajkamal in February 1980 and another room to Chandrabhan in March 1980 and they were living in the said portion of the property since 1979; whereas registered sale-deed was executed in 1981 and even prior to registration of sale-deed, all these developments took place in the full knowledge of the plaintiff.

18. DW-3 Chandrabhan Giri deposed before the trial court that he was a tenant of Prem Shanker prior to 30.7.1981 since February/March 1980 upto 1983 and according to him, the plaintiff Radhey Shyam was fully knowing this fact.

DW-4 Vinod Kumar, husband of Sushila also appeared in the witness box and supported the case of the defendants. He specifically stated that the Registry of both the portions in favour of respective purchasers was agreed to be done at the same time and the said talk had taken place in the presence of Suraj Narayan who unfortunately expired lateron.

19. In view of aforesaid discussion on statements of various witnesses, the conclusion arrived at by the trial court that the plaintiff had acquiesced in the matter and waived his right of pre-emption, cannot be faulted. It cannot be believed that the defendant no.1 having taken possession of the said portion of the property in 1979 having carried out some repair work and having let out two rooms to two different persons and he himself also continued to live there. All these facts would escape the notice of the plaintiff Radhey Shyam who is living in another portion of the same property and coupled with the fact that he was put to notice before giving registered sale-deed in favour of defendant no.1 and his presence on different occasions and still keeps silent & refuses to purchase the said property at the consideration offered by defendant no.1 clearly leads to the conclusion that he waived his right of pre-emption over the said portion of the property. The notice under Sec.8 of the Act is not required to be in writing unless it is served through the

civil court under sub-section (2). Therefore even an oral or constructive notice to the pre-emptor can be established in view of the circumstances of the case. Therefore, the findings arrived at by the trial court that the plaintiff had waived his right of pre-emption and was thus not entitled to be substituted in place of defendant no.1 is correct and the same is affirmed by this court.

20. Consequently, this appeal is found to be devoid of merit and the same is accordingly dismissed. No orders as to cost.

(Dr.VINEET KOTHARI),J.

Srawat/-